



FUTURE OF FINANCIAL ADVICE AND DISPUTE RESOLUTION

Background

The Federal Government has recently announced details of its Future of Financial Advice ('FOFA') reforms.

This paper outlines the Superannuation Complaints Tribunal's ('SCT') understanding of some of the key issues arising in relation to the current arrangements for resolution of disputes regarding financial advice provided by superannuation funds.

The purpose of this paper is to help inform all parties involved in the thinking around the FOFA reforms and how they apply to disputes about advice provided by trustees of superannuation funds.

Statutory and regulatory framework

The starting point for operation of external dispute resolution ('EDR') in relation to financial services is the *Corporations Act 2001* ('the Corps Act').

Paragraphs 912A(2)(b) and 1017G(2)(b) of the Corps Act require that Australian financial services ('AFS') licensees or financial product issuers have an EDR system that consists of:

- (b) *membership of one or more external dispute resolution schemes that:*
 - (i) *is, or are approved by ASIC in accordance with the regulations made for the purposes of this sub-paragraph; and*
 - (ii) *covers, or together covers, complaints (other than complaints that may be dealt with by the Superannuation Complaints Tribunal established by section 6 of the Superannuation (Resolution of Complaints Act) 1993), against the licensee made by retail clients in connection with the provision of all financial services covered by the licence.*

Dispute resolution by the SCT in relation to decisions of superannuation fund trustees pre-dated the EDR arrangements under the financial services regime ('FSR') by a decade. The intention of the FSR arrangements was to integrate the pre-existing SCT into the new generic EDR obligations under the FSR regime.

The obligation on an AFS licensee or financial product issuer is therefore to be a member of an EDR scheme that covers complaints by retail clients about financial services provided, other than complaints over which the SCT already has jurisdiction. There is no additional obligation on AFS licensees or financial product issuers with respect to the complaints that the SCT has jurisdiction over because those obligations are set out in the *Superannuation (Resolution of Complaints) Act 1993* ('the SRC Act').

ASIC Regulatory Guide 165: *Licensing: Internal and external dispute resolution* [RG 165] (April 2011) discusses this obligation and reflects that AFS licensees and product issuers considering their obligations under the Corps Act should commence with an understanding of the SCT's jurisdiction, as set out below:

RG 165.7 As the SCT is a statutory tribunal, established under the Superannuation (Resolution of Complaints) Act 1993, it operates differently to ASIC-approved EDR schemes in that:

- (a) the SCT is not subject to ASIC's approval and thus RG 139 does not apply to it; and*
- (b) AFS licensees, unlicensed product issuers and unlicensed secondary sellers are not required to be members of the SCT in the same way as an ASIC-approved EDR scheme because the SCT has jurisdiction to handle certain types of superannuation-related complaints by virtue of the relevant provisions of the legislation.*

RG 165.8 The requirement to be a member of an ASIC-approved EDR scheme does not apply in relation to complaints made by retail clients that may be dealt with by the SCT: see s912A(2)(b)(ii) and 1017G(2)(b)(ii), Corporations Act.

RG 165.9 So, where the SCT can deal with all retail client complaints about the financial products and services you provide, you will not need to join an ASIC-approved EDR scheme.

RG 165.10 However, if the SCT cannot deal with complaints about all the financial products and services you provide, you must belong to an ASIC-approved EDR scheme that can deal with those complaints that fall outside the SCT's jurisdiction.

RG 165.11 As the SCT does not have jurisdiction to deal with complaints about other (non-superannuation) products or services that do not relate to a decision of a trustee in relation to the fund, where you are a trustee who gives advice about products that are available outside your superannuation fund (i.e. banking products or post-retirement products), membership of an ASIC-approved EDR scheme will be required.

RG 165.12 It should be noted that, in handling a complaint, the SCT may refer the whole or part of a complaint to an ASIC-approved EDR scheme: s22A, Superannuation (Resolution of Complaints) Act 1993.

SCT's jurisdiction in relation to trustees' advice to fund members

The SCT's jurisdiction is determined by reference to the identity of the decision maker. On this basis, the SRC Act relies on the concept of a "decision" by the trustee of a regulated superannuation fund ('a trustee').

The SRC Act identifies the subject matter of a trustee decision only for the purposes of limiting or excluding the jurisdiction of the SCT to deal with a complaint about certain decisions. For example, time limits apply in relation to decisions about the payment of a death benefit and of certain disability benefits (s14(4) and s14(6A) to (6D) of the SRC Act), and the SCT cannot deal with either an excluded complaint (s14(2) of the SRC Act) or excluded subject matter (s14(5) of the SRC Act), or a complaint that relates to the management of the fund as a whole (s14(6) of the SRC Act).

There is nothing in the SRC Act that excludes from the SCT's jurisdiction complaints about financial advice given by trustees to their members. However, the ability of the SCT to deal with a complaint made to it could be affected indirectly by the scope of the requirement for a trustee to maintain internal dispute resolution arrangements under s101 of the *Superannuation (Resolution of Complaints) Act 1993* ('SIS Act'). Under s19 of the SRC Act the SCT cannot deal with a complaint unless the complainant satisfies the SCT that a complaint about the same subject matter has been made under arrangements for dealing with complaints under s101 of the SIS Act.

Section 101 of the SIS Act provides that a trustee's internal dispute resolution arrangements must give beneficiaries and other persons the right to make an inquiry into or a complaint about "the operation or management of the fund" in relation to them. It appears clear that this would include advice of the kind such as in ASIC Class Order [CO 09/201] *Intra-fund superannuation advice*, i.e. advice given by the trustee to a member about the member's interest in the fund and the choices a member may make in relation to participation in the features of the fund. The Tribunal would be required to hear these complaints.

Advice to members by trustees includes both general and personal financial product advice under the Corps Act. In any particular case the personal advice given to the member by the trustee may extend beyond only intra-fund type advice and may also include advice that is both intra-fund type advice and advice on other matters as part of a broader strategy. There does not appear to be anything in the purpose and context of s101 of the SIS Act to support a view that the trustee's internal dispute resolution arrangements are not required to deal with complaints in relation to such broader integrated advice. Section 101(1A)(c) of the SIS Act also indicates that the generality of "the operation or management of the fund" should not be limited.

Accordingly, for the purposes of s 19 of the SRC Act a complainant would be able to satisfy the SCT that a complaint to a trustee in relation to such financial advice provided by a trustee to a member had been made under arrangements for dealing with complaints under s101 of the SIS Act. The Tribunal would also be required to hear these complaints.

The complaint would be a complaint about a trustee's decision under s14 of the SRC Act. The definition of "decision" in s4 of the SRC Act focuses on the making or failing to make a decision, as well as engaging in conduct or failing to engage in conduct in relation to making a decision.

In the context of a complaint about a trustee providing financial advice to a fund member there appears to be several 'events' that have potential to be "decisions" by the trustee:

- (i) the event of the parties becoming engaged in an advice process, e.g. the trustee agreeing to provide the advice;
- (ii) the event of the trustee delivering the advice to the member, i.e. providing the advice;
- (iii) the event of the member relying on that advice, e.g. by shifting position on the basis of the advice, or not doing so;
- (iv) a perception at some point that the advice provided by the trustee was deficient or poor in some respect leading to the reliance on that advice producing an adverse outcome for the member;
- (v) the event of the member making a request or demand of the trustee to make good or remedy the adverse outcome by compensating the member;
- (vi) the event of the trustee's refusal to make good or remedy the adverse outcome by compensating the member;
- (vii) a complaint by the member to the trustee under s101 of the SIS Act about the trustee's refusal to provide compensation or remedy;
- (viii) a response by the trustee under s101 of the SIS Act confirming its refusal to provide the compensation or remedy sought in relation to its allegedly deficient or poor financial advice.

Further, under s14(1) of the SRC Act, a complaint could be made to the SCT by a former member of a fund in relation to advice received while a member of the fund.

It would appear that:

- the event at paragraph (i) above is unlikely to be a decision of the trustee but, even if it was, it would appear to be a decision that in practice would not be likely to draw complaints;
- the event at paragraph (ii) above, i.e. to provide the particular advice, will be a decision of the trustee in that it is a definitive act. However, this decision would, at the time it was made, be freestanding of any context. The decision would gain a context for a complaint from later actions, such as the member's actions to place reliance on the advice and a complaint to the trustee about the

adverse outcomes of that reliance. Without this later context, the decision may not draw a complaint that would enliven the jurisdiction of the SCT;

- the events at paragraphs (iii), (iv), (v) and (vii) above are not, on any view, "decisions" of the trustee.;
- regardless of anything else in paragraphs (i) to (v) above, the event at paragraph (vi) above, i.e. a refusal by the trustee to agree to provide compensation or a remedy in relation to its allegedly deficient or poor financial advice, would also clearly be a decision of the trustee for the purposes of a complaint under s14 of the SRC Act. While some complaints will be expressed to the SCT clearly in terms of that 'the trustee has refused to compensate me/provide a remedy', other complaints in relation to financial advice will be able to be taken as such from the context and the evidence provided.
- the event at paragraph (viii) appears not to be a decision of the trustee for the purposes of the SRC Act, the focus of which is on the decision complained about rather than the trustee's subsequent confirmation of that decision.

Trustees may also choose to provide their members with stand-alone advice that is beyond intra-fund type advice, and not integrated with any intra-fund type advice. The SCT's ability to deal with a complaint about such advice under s19 of the SRC Act turns on the ability of the complainant to satisfy the SCT that a complaint about the same subject matter has been made under arrangements for dealing with complaints under s101 of the SIS Act. An issue here will be whether the advice, by virtue of being given as part of a trustee-member relationship, is sufficient for the complaint to be considered to be about "the operation or management of the fund" in relation to the person.

Different business models under which financial product advice may be provided

The Government's proposed FOFA arrangements involve amendment of the reasonable basis of advice obligation to make clear that scaled or simple, single issue personal financial product advice can be provided by an AFS licensee, including by trustees.

Personal financial product advice to superannuation fund members is provided by trustees in the following ways:

- the trustee may provide the advice itself, i.e. under its own AFS licence via its own employees or via its own authorised representatives; or
- the trustee may refer members to an outsourced adviser who provides advice to fund members under its own AFS licence.

Advice provided by a trustee

As discussed above, where a trustee provides the advice to a member (of whatever type) under its own AFS licence, and a dispute arises in relation to that advice, there

has been a "decision" of the trustee for the purposes of the SRC Act. In these cases a complaint about that advice would be within the SCT's jurisdiction.

Advice provided by a trustee to a member will cover advice provided under the trustee's own AFS licence provided on its behalf by its "representatives" within the meaning of s 910A of the Corps Act and will therefore include advice provided on behalf of the trustee by:

- an employee or director of the AFS licensed trustee;
- an employee or director of a related body corporate of the AFS licensed trustee; and
- an authorised representative of the AFS licensed trustee.

In these cases there is a "decision of the trustee" for the purposes of the SRC Act because that Act captures as being "of the trustee" the actions of persons other than the trustee where the trustee is legally responsible for those actions.

There can also be a "decision" of the trustee for the purposes of the SRC Act where the advice is provided by a person on the trustee's behalf even if the person holds their own AFS licence. This is because:

- Paragraphs 911B(1)(d) and s 911B(3) of the Corps Act deal with the case where one AFS licensee provides financial services (including personal financial product advice) on behalf of another licensee. Those provisions have effect that where advice is provided by AFS licensee 1 on behalf of AFS licensee 2, for the purposes of Chapter 7 of the Corps Act, the advice is not taken to have been given by AFS licensee 2. Instead, for the purposes of Chapter 7 of the Corps Act, the advice is taken to be given by AFS licensee 1.
- However, outside of Chapter 7 of the Corps Act, including for the purposes of the SRC Act, it appears that the effect of AFS licensee 1 providing advice on behalf of AFS licensee 2 will be that AFS licensee 2 will be responsible for the advice. A practical example is the case where a fund administrator with its own AFS licence provides advice to fund members on behalf of a trustee that also holds an AFS licence.

Outsourced advice provided under a contract with a trustee

Where the advice to the member is provided by a person other than the trustee and the advice is provided by a person under a contract with the trustee, there will be no "decision" of a trustee for the purposes the SRC Act unless the trustee is legally responsible for the advice. The trustee would not appear to be legally responsible for advice provided under the other person's own AFS licence where, e.g.:

- the advice is provided by an AFS licensee as part of a 'panel' of advisers to whom members are referred by the trustee, and where the advisers provide the advice independently on referral of the trustee and do not advise on behalf of the fund trustee; or

- the advice is provided by a fund administrator that provides the advice under its own AFS licence and where the administrator provides the advice independently and does not provide the advice under arrangements where it provides the advice on behalf of the trustee.

In these cases the SCT would not have jurisdiction to hear a complaint in relation to that advice but the member would be able to access an ASIC approved EDR scheme.

Where the advice is provided by an AFS licensee with no connection to a superannuation fund trustee, there will be no "decision" of a trustee for the purposes the SRC Act. In these cases the SCT would not have jurisdiction to hear a complaint in relation to that advice but the complainant would be able to access an ASIC approved EDR scheme.

Observation

There is therefore the potential for complaints about essentially the same subject matter – advice to a member about their superannuation – to be heard by the SCT or an ASIC approved EDR scheme, with different remedies and appeal rights.

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